



[BILLING CODE: 6110-01-P]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

SUMMARY: The Assembly of the Administrative Conference of the United States adopted four recommendations at its hybrid (virtual and in-person) Seventy-ninth Plenary Session: Proactive Disclosure of Agency Legal Materials, Virtual Public Engagement in Agency Rulemaking, Using Algorithmic Tools in Retrospective Review of Agency Rules, and Online Processes in Agency Adjudication.

FOR FURTHER INFORMATION CONTACT: For Recommendations 2023-1, 2023-2, and 2023-3, Kazia Nowacki; and for Recommendation 2023-4, Matthew A. Gluth. For each of these recommendations the address and telephone number are: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591–596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations to agencies, the President, Congress, and the Judicial Conference of the United States for procedural improvements (5 U.S.C. 594(1)). For further information about the Conference and its activities, see www.acus.gov.

The Assembly of the Conference met during its Seventy-ninth Plenary Session on June 15, 2023, to consider four proposed recommendations and conduct other business. All four recommendations were adopted.

Recommendation 2023-1, *Proactive Disclosure of Agency Legal Materials*. This recommendation identifies statutory reforms that, if enacted by Congress, would provide clear standards as to what legal materials agencies must publish and where they must publish them (whether in the *Federal Register*, on their websites, or elsewhere). The amendments also account for technological developments and correct certain statutory ambiguities and drafting errors. The objective of these amendments is to ensure that agencies provide ready public access to important legal materials in the most efficient way possible.

Recommendation 2023-2, *Virtual Public Engagement in Agency Rulemaking*. This recommendation identifies best practices to promote enhanced transparency, accessibility, and accountability when agencies use virtual tools to host public engagement meetings during the rulemaking process. It encourages agencies to offer virtual options when it would be beneficial to do so and offers best practices for structuring virtual public engagements in a way that meets public expectations and promotes valuable input for the agency.

Recommendation 2023-3, *Using Algorithmic Tools in Retrospective Review of Agency Rules*. This recommendation identifies best practices for agencies to consider when designing or using artificially intelligent or other algorithmic tools to identify rules that are outmoded or redundant, contain typographical errors or inaccurate cross-references, or might benefit from resolving issues with intersecting or overlapping rules or standards. It also discusses how agencies can design these tools in a way that promotes transparency, public participation, and accountability.

Recommendation 2023-4, *Online Processes in Agency Adjudication*. This recommendation identifies best practices for developing online processes by which private parties, representatives, and other participants in agency adjudications can file forms, evidence, and briefs; view case materials and status information; receive notices and orders; and perform other common adjudicative tasks.

The Conference based its recommendations on research reports and prior history that are posted at: <https://www.acus.gov/event/79th-plenary-session>.

The Appendix below sets forth the full texts of each recommendation. The Conference will transmit the recommendations to affected agencies, Congress, and the Judicial Conference of the United States, as appropriate.

Authority: 5 U.S.C. 595.

Dated: June 28, 2023.

Shawne C. McGibbon,

General Counsel.

APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2023-1

Proactive Disclosure of Agency Legal Materials

Adopted June 15, 2023

Agencies produce many kinds of legal materials—that is, documents that establish, interpret, apply, explain, or address the enforcement of legal rights and obligations, along with

constraints imposed, implemented, or enforced by or upon an agency.¹ Agency legal materials come in many forms, ranging from generally applicable rules to orders issued in the adjudication of individual cases. Many statutes govern the public disclosure of these materials, including the Freedom of Information Act (FOIA),² the Federal Register Act,³ and the E-Government Act of 2002.⁴ Together, these statutes require agencies to proactively disclose certain materials, either by publishing them in the *Federal Register* or posting them on their websites. Other materials must be made available upon request. Some materials, based on their nature or content, are exempt from disclosure.

Since its establishment, the Administrative Conference has adopted dozens of recommendations encouraging agencies to proactively disclose important legal materials, even beyond what the law currently requires, and to make them publicly available in a readily accessible fashion.⁵ The Conference has identified best practices that, in some cases, Congress could implement through legislative action.

Considering the principal statutes governing the disclosure of agency legal materials, the Conference has also identified problems—inconsistencies and uncertainties, for example—that Congress should remedy through statutory reforms. Developed at different times and for

¹ Bernard W. Bell, Cary Coglianese, Michael Herz, Margaret B. Kwoka & Orly Lobel, Disclosure of Agency Legal Materials 5 (May 30, 2023) (report to the Admin. Conf. of the U.S.).

² 5 U.S.C. 552.

³ 41 U.S.C. ch. 15.

⁴ Pub. L. No. 107-347, 116 Stat. 2899 (2002).

⁵ Recommendations adopted in recent years include: Admin. Conf. of the U.S., Recommendation 2022-6, *Public Availability of Settlement Agreements in Agency Enforcement Proceedings*, 88 FR 2312 (Jan. 13, 2023); Admin. Conf. of the U.S., Recommendation 2021-7, *Public Availability of Inoperative Agency Guidance Documents*, 87 FR 1718 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-5, *Publication of Policies Governing Agency Adjudicators*, 86 FR 6622 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2019-3, *Public Availability of Agency Guidance Documents*, 84 FR 38931 (Aug. 8, 2019); Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 FR 2142 (Feb. 6, 2019); and Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 FR 31039 (July 5, 2017).

different purposes, these statutes contain overlapping requirements that are sometimes difficult to harmonize. Some statutes are quite old—the Federal Register Act, for example, dates from 1935—and technological developments and organizational changes have rendered certain provisions outdated. Some statutory provisions are vague, which has led to litigation over their meaning and to differing agency practices.⁶

To ensure that agencies provide ready public access to important legal materials in the most efficient manner, this Recommendation identifies several statutory reforms that, if enacted by Congress, would provide clear standards as to what legal materials agencies must publish in the *Federal Register*, post on their websites, or otherwise proactively disclose. The Conference recognizes that these statutory reforms would impose additional initial and ongoing costs on agencies. At the same time, proactive disclosure of agency legal materials may save staff time or money through a reduction in the volume of FOIA requests or printing costs, or an increase in the speed with which agency staff will be able to respond to remaining FOIA requests. In assigning responsibilities for overseeing the development and implementation of the proactive disclosure plans and for overseeing the agency’s compliance with all legal requirements for the proactive disclosure of agency legal materials, agencies may wish to consider existing officials and the potential for overlapping or shared responsibilities.⁷

This Recommendation should not be considered as an exhaustive catalog of useful reforms. For example, it does not address whether the exemptions from FOIA’s general disclosure requirements⁸ should be amended or recommend actions that may be at odds with FOIA. The statutory reforms proposed in this Recommendation therefore would not require

⁶ See generally Bell et al., *supra* note 1.

⁷ For example, 5 U.S.C. 552(j) requires agencies to designate a Chief FOIA Officer.

⁸ 5 U.S.C. 552(b).

agencies to proactively disclose matters exempted or excluded from FOIA's general disclosure requirements, including "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency." Congress should also consider timeframes for implementation of the proactive disclosure recommendations, whether for newly created or preexisting agency legal materials.

Nothing in this Recommendation should be interpreted to constitute the Conference's interpretation of the statutes governing the disclosure of agency legal materials. Any recommendation that a statutory provision be amended to "provide" something does not necessarily mean that the law does not already require it. Nor should this Recommendation be read as superseding the Conference's many previous recommendations on the disclosure of agency legal materials. In the absence of congressional action, the Conference encourages agencies to adopt the best practices identified in this Recommendation and its many previous recommendations.

RECOMMENDATION

Proactive Disclosure of Agency Legal Materials

1. Congress should amend 5 U.S.C. 552(a)(2) to provide, subject to Paragraph 2 of this Recommendation and the exemptions and exclusions in 5 U.S.C. 552(b) and (c), that each agency make available on its website:
 - a. Final opinions and orders issued in adjudications that are governed by 5 U.S.C. 554 and 556–557 or otherwise issued after a legally required opportunity for an evidentiary hearing. Each agency should proactively disclose any such opinion or order regardless of whether the agency designates the opinion or order as precedential, published, or other similar designation;

- b. Written documents that communicate to a member of the public the agency's decision not to enforce a legal requirement against an individual or entity. Such documents may include decisions to grant an individual or entity a waiver or exemption, and advisory opinions that apply generally applicable legal requirements to specific facts or explain how the agency will exercise its discretion in particular cases;
 - c. Written legally binding opinions and memoranda issued by or under the authority of its chief legal officers;
 - d. Settlement agreements to which the agency is a party;
 - e. Memoranda of understanding, memoranda of agreement, and other similar inter-agency or inter-governmental agreements that affect a member of the public;
 - f. Any operative agency delegations of legal authority;
 - g. Any operative orders of succession for agency positions whose occupants must be appointed by the President with the advice and consent of the Senate; and
 - h. Any statutory or agency designations of first assistant positions to positions whose occupants must be appointed by the President with the advice and consent of the Senate.
2. Congress should provide in 5 U.S.C. 552 that an agency may promulgate regulations providing that it will not proactively disclose some records described in Paragraph 1 of this Recommendation, and subject to the exemptions and exclusions in 5 U.S.C. 552(b) and (c), because individual records in the relevant category do not vary considerably in terms of their factual contexts or the legal issues they raise, or that proactive disclosure of such documents would be misleading. Any such rule should explain which records the

agency will not proactively disclose and what other information (e.g., aggregate data, representative samples), if any, the agency will proactively disclose instead to adequately inform the public about agency activities.

3. Congress should provide a mechanism for ensuring that agencies:
 - a. Develop and post disclosure plans—internal management plans and procedures for making legal materials available online on their websites; and
 - b. Designate an officer or officers responsible for overseeing the development and implementation of the proactive disclosure plans described in Paragraph 3(a), and for overseeing the agency’s compliance with all legal requirements for the proactive disclosure of agency legal materials.
4. Because various provisions of the E-Government Act, Pub. L. No. 107-347, governing proactive disclosure are duplicative, contain drafting errors, or are outdated, Congress should amend the statute to:
 - a. Delete 206(b);
 - b. Delete “and (b)” in 207(f)(1)(A)(ii); and
 - c. Eliminate references to the Interagency Committee on Government Information, which no longer exists. Congress should instead require that the Office of Management and Budget, after consultation with other relevant inter-agency bodies, periodically update its guidance on federal agency public websites to ensure that agencies present legal materials, required to be disclosed proactively, on their websites in a clear, logical, and readily accessible fashion.
5. Congress should provide that each agency should post each of its legislative rules, or a link to those rules, on its website, and should, to the extent feasible, include links to

related agency legal materials, such as preambles and other guidance documents explaining the rule or significant adjudicative opinions interpreting or applying it.

Enforcement of Proactive Disclosure Requirements

6. Congress should provide that a person may use the process described in 5 U.S.C. 552(a)(3) to request that an agency proactively disclose certain records when the requestor alleges the agency is legally required to proactively disclose the records but has not done so.
7. Congress should provide in 5 U.S.C. 552(a)(4) that when a district court finds that an agency has not proactively disclosed records when legally required to do so, the reviewing court may order the agency to make them available to the general public in the manner required by the proactive disclosure provisions of 5 U.S.C. 552(a). Congress should also provide that a requester must exhaust administrative remedies required by 5 U.S.C. 552 before filing a complaint in district court to compel an agency to proactively disclose records.

Preparation of Proposed Legislation

8. The Conference's Office of the Chair should prepare and submit to Congress proposed statutory changes consistent with this Recommendation.

Administrative Conference Recommendation 2023-2

Virtual Public Engagement in Agency Rulemaking

Adopted June 15, 2023

The law often requires agencies to give interested persons an opportunity to participate in rulemakings.¹ Presidential directives, including Executive Order 14,094, *Modernizing Regulatory Review*, also instruct agencies to proactively engage a range of interested or affected persons, including underserved communities and program beneficiaries.² And as a matter of best practice, the Administrative Conference has encouraged agencies to consider additional opportunities for public engagement.³

Interested persons are often able to learn about participation opportunities through notice in the *Federal Register* and participate in the rulemaking by submitting written data, views, and arguments, typically after the agency has issued a notice of proposed rulemaking (NPRM).

Agencies may also provide opportunities for oral presentation, whether before or after an NPRM has been issued. This opportunity can take the form of a public hearing, meeting, or listening session—what this Recommendation refers to as a “public rulemaking engagement.” Agencies may provide a public rulemaking engagement because a statute, presidential directive, or agency rule or policy requires one or because such engagement would improve agency decision making and promote public participation in regulatory policymaking.⁴ The Conference has encouraged agencies to hold public rulemaking engagements when it would be beneficial to

¹ See, e.g., 5 U.S.C. 553(c).

² 88 FR 21879 (Apr. 6, 2023).

³ Admin. Conf. of the U.S., Recommendation 2021-3, *Early Input on Regulatory Alternatives*, 86 FR 36082 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, 84 FR 2146 (Feb. 6, 2019); Admin. Conf. of the U.S., Recommendation 2017-2, *Negotiated Rulemaking*, 82 FR 31040 (July 5, 2017); Admin. Conf. of the U.S., Recommendation 2014-6, *Petitions for Rulemaking*, 79 FR 75117 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2013-5, *Social Media in Rulemaking*, 78 FR 76269 (Dec. 17, 2013); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E- Rulemaking*, 77 FR 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in E-Rulemaking*, 76 FR 48789 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 41 FR 29654 (July 19, 1976); Admin. Conf. of the U.S., Recommendation 72-1, *Broadcast of Agency Proceedings*, 38 FR 19791 (July 23, 1973).

⁴ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking 5–6 (May 25, 2023) (report to the Admin. Conf. of the U.S.).

do so and to explore more effective options for notice, to ensure interested persons are aware of and understand regulatory developments that affect them. Agencies also directly engage with people and organizations that are interested in and affected by their rules, and the Conference has encouraged them to do so consistent with rules governing the integrity of the rulemaking process.⁵

When agencies engage with the public, they must ensure that they meet all legal accessibility requirements.⁶ Effective public engagement also requires that agencies identify and address barriers to participation, including geographical constraints, resource limitations, and language barriers. For example, to ensure that all people affected by a rulemaking are aware of the rulemaking and opportunities to participate, the Conference has recommended that agencies conduct outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented.⁷

In recent years, and especially during the COVID-19 pandemic, agencies increasingly have used widely available, internet-based videoconferencing software to engage with the public.⁸ By reducing some barriers that people—especially members of historically underserved communities—encounter, virtual public engagement can help broaden participation in agency

⁵ See Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, 79 FR 35993 (June 25, 2014).

⁶ See, e.g., Rehabilitation Act of 1973, 508, 29 U.S.C. 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; E.O. 13985, 86 FR 7009 (Jan. 20, 2021); E.O. 13,166, 65 FR 50121 (Aug. 11, 2000).

⁷ E.g., Admin. Conf. of the U.S., Recommendation 2021-3, *Early Public Input on Regulatory Alternatives*, paragraph 3, 86 FR 36082–36083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2018-7, *Public Engagement in Rulemaking*, paragraph 1(b), 84 FR 2146-2147 (Feb. 6, 2019).

⁸ This mirrors developments with respect to the use of virtual hearings in agency adjudication. See Admin. Conf. of the U.S., Recommendation 2021-6, *Public Access to Agency Adjudicative Proceedings*, 87 FR 1715 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 FR 36083 (July 8, 2021).

rulemakings.⁹ At the same time, virtual engagements may present barriers to access for some people, such as low-income individuals for whom it may be difficult to obtain access to high-quality personal devices or private internet services, individuals in rural areas who lack access to broadband internet, individuals whose disabilities prevent effective engagement in virtual proceedings or make it difficult to set up and manage the necessary technology, and individuals with limited English proficiency. Some individuals may also have difficulty, feel uncomfortable, or lack experience using a personal device or internet-based videoconferencing software to participate in an administrative proceeding.¹⁰

This Recommendation encourages agencies to offer virtual options when they determine it would be beneficial to hold a public rulemaking engagement or directly engage with specific people and organizations. It also offers best practices for planning, improving notice of, and managing public rulemaking engagements, as well as ensuring that members of the public can easily access materials related to virtual public rulemaking engagements (e.g., agendas, recordings, transcripts) and underlying rulemakings (e.g., draft rules, docket materials). This Recommendation builds on many previous recommendations of the Conference regarding public participation in agency rulemaking, including Recommendation 2018-7, *Public Engagement in Rulemaking*, which, among other things, encourages agencies to develop comprehensive plans for public engagement in rulemaking, and Recommendation 2014-4, “*Ex Parte*” *Communications in Informal Rulemaking*, which offers best practices for engaging with members of the public while safeguarding the integrity of agency rulemaking.

⁹ Kazia Nowacki, Virtual Public Engagement in Agency Rulemaking (May 25, 2023) (report to the Admin. Conf. of the U.S.).

¹⁰ Cf. Recommendation 2021-4, *supra* note 8.

RECOMMENDATION

Virtual Public Engagement Planning

1. Agencies that engage in rulemaking should, when feasible and appropriate, utilize internet-based videoconferencing software as a means of broadening engagement with interested persons in a cost-effective way, including through outreach that targets members of the public with relevant views who do not typically participate in rulemaking or may otherwise not be represented. As part of its overall policy for public engagement in rulemaking (described in Recommendation 2018-7, *Public Engagement in Rulemaking*), each agency should explain how it intends to use internet-based videoconferencing to engage with the public.
2. Each agency should ensure that its policies regarding informal communications between agency personnel and individual members of the public related to a rulemaking (described in Recommendation 2014-4, *“Ex Parte” Communications in Informal Rulemaking*) cover communications that take place virtually.
3. Each agency should prepare and post to a publicly available website guidance on the conduct of virtual public rulemaking engagements—that is, a meeting, hearing, listening session, or other live event that is rulemaking related and open to the general public—and ensure employees involved with such engagements are familiar with that guidance.
4. When an agency plans to hold a public rulemaking engagement, it should allow for interested persons to observe the engagement remotely and, when feasible, provide input and ask questions remotely.
5. When an agency decides to hold a public rulemaking engagement, rulemaking personnel should collaborate with personnel who oversee communications, public affairs, public

engagement, and other relevant activities for the agency to ensure the engagement reaches the potentially interested members of the public and facilitates effective participation from those persons, including groups that are affected by the rulemaking and may otherwise have been underrepresented in the agency's administrative process.

Notice

6. An agency should include, as applicable, the following information in the public notices for a public rulemaking engagement with a virtual or remote component:
 - a. The date and time of the engagement, at the beginning of the notice;
 - b. Options for remote attendance, including a direct link or instructions to obtain a direct link to the internet-based videoconference event and alternative remote attendance options for members of the public without access to broadband internet, at the beginning of the notice;
 - c. A plain-language summary of the rulemaking and description of the engagement's purpose and agenda and the nature of the public input, if any, the agency is seeking to obtain through the engagement;
 - d. A link to the webpage described in Paragraph 7;
 - e. Information about opportunities for members of the public to speak during the engagement, including any directions for requesting to speak and any moderation policies, such as limits on the time for speaking;
 - f. The availability of services such as closed captioning, language interpretation, and telecommunications relay services and access instructions;
 - g. The availability and location of a recording, a transcript, a summary, or minutes; and

- h. Contact information for a person who can answer questions about the engagement or arrange accommodations.
- 7. To encourage participation in a public rulemaking engagement, the agency should create a dedicated webpage for each such engagement that includes the information described in Paragraph 6. The webpage should include, as applicable, a link to:
 - a. The internet-based videoconferencing event, its registration page, or information for alternative remote attendance options for members of the public without access to broadband internet;
 - b. The *Federal Register* notice;
 - c. Any materials associated with the engagement, such as an agenda, a program, speakers' biographies, a draft rule, the rulemaking docket, or questions for participants;
 - d. A livestream of the engagement for the public to observe while it is occurring; and
 - e. Any recording, transcript, summary, or minutes after the engagement has ended.
- 8. The Office of the Federal Register (OFR) should update the *Document Drafting Handbook* to provide agencies guidance on drafting *Federal Register* notices for public rulemaking engagements with virtual or remote components that include the information described in Paragraph 6.
- 9. OFR and the eRulemaking Program should update the "Document Details" sidebar on FederalRegister.gov and Regulations.gov to include, for any rulemaking in which there is a public rulemaking engagement, a link to the agency webpage described in Paragraph 7.

Managing Virtual Public Engagements

10. When feasible, each agency should allow interested persons to observe a livestream of the public rulemaking engagement remotely and should not require members of the public to register. Agencies may want to set a registration deadline for those wishing to speak or requiring accommodations.
11. To manage participants' expectations, an agency should communicate the following matters, among others, to participants at the beginning of the event:
 - a. The purpose and goal of the engagement;
 - b. The moderation policies, including those governing speaking time limits and whether or why the agency will or will not respond to oral statements made by participants;
 - c. The management of the public speaking queue;
 - d. Whether the chat function, if using an internet-based videoconferencing platform, will be disabled or monitored and, if monitored, whether the chat will be included in the record;
 - e. How participants can access the rulemaking materials throughout the meeting; and
 - f. Whether the event will be recorded or transcribed and where it will be made available.
12. As agency resources allow, each agency should ensure it has adequate support to run public rulemaking engagements, including their virtual and other remote components. Adequate support might include technological or troubleshooting assistance, a third-party moderating service, or a sufficient number of available staff members.

Recordings and Transcripts

13. When an agency holds a public rulemaking engagement, it should record, transcribe, summarize, or prepare meeting minutes of the engagement unless doing so would adversely affect the willingness of public participants to provide input or ask questions.
14. Each agency should, in a timely manner, make any recording, transcript, summary, or minutes of a public rulemaking engagement available in any public docket associated with the rulemaking and on the webpage described in Paragraph 7.

Fees

15. Agencies should not assess fees on the public for virtual public engagement.

Administrative Conference Recommendation 2023-3

Using Algorithmic Tools in Retrospective Review of Agency Rules

Adopted June 15, 2023

Retrospective review is the process by which agencies assess existing rules and decide whether they need to be revisited. Consistent with longstanding executive-branch policy, the Administrative Conference has endorsed the practice of retrospective review of agency rules (including those that incorporate standards by reference), encouraged regulatory agencies to cultivate a culture of retrospective review, and urged agencies to establish plans to conduct retrospective reviews periodically.¹ The Conference has also recognized, however, that agencies often have limited resources available to conduct retrospective reviews. To encourage agencies to undertake retrospective reviews despite resource limitations, the Conference has identified

¹ See, e.g., Admin. Conf. of the U.S., Recommendation 2021-2, *Periodic Retrospective Review*, 86 FR 36080 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2017-6, *Learning from Regulatory Experience*, 82 FR 61783 (Dec. 29, 2017); Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 FR 75114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-5, *Incorporation by Reference*, 77 FR 2257 (Jan. 17, 2012); Recommendation 95-3, *Review of Existing Agency Regulations*, 60 FR 43108 (Aug. 18, 1995).

opportunities for agencies to conserve resources, for example by taking advantage of internal and external sources of information and expertise.²

New technologies may offer additional opportunities for agencies to conserve resources and conduct more robust retrospective review in a cost-effective manner. Among these, algorithmic tools may enable agencies to automate some tasks associated with retrospective review. An algorithmic tool is a computerized process that uses a series of rules or inferences drawn from data to transform specified inputs into outputs to make decisions or support decision making.³ The use of such tools may also help agencies identify issues that they otherwise might not detect. The General Services Administration (GSA) and several other agencies have already begun experimenting with the use of algorithmic tools to conduct some tasks in service of retrospective review or similar functions.⁴

Although algorithmic tools hold out the promise of lowering the cost of completing governmental tasks and improving the quality, consistency, and predictability of agencies' decisions, agencies' use of algorithmic tools also raises important concerns.⁵ Statutes, executive orders, and agency policies highlight many such concerns.⁶ In a prior Statement, the Conference itself described concerns about transparency (especially given the proprietary nature of some

² Admin. Conf. of the U.S., Recommendation 2014-5, *Retrospective Review of Agency Rules*, 79 FR 75114 (Dec. 17, 2014).

³ Algorithmic tools include, but are not limited to, applications that use artificial intelligence techniques.

⁴ Catherine M. Sharkey, *Algorithmic Retrospective Review of Agency Rules* (May 3, 2023) (report to the Admin. Conf. of the U.S.).

⁵ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* (Feb. 2020) (report to the Admin. Conf. of the U.S.).

⁶ *See, e.g.*, AI Training Act, Pub. L. No. 117-207, 136 Stat. 2237 (Oct. 17, 2022); E.O. 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 88 FR 10825 (Feb. 16, 2023); E.O. 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 FR 78939 (Dec. 3, 2020); E.O. 13859, *Maintaining American Leadership in Artificial Intelligence*, 84 FR 3967 (Feb. 11, 2019).

artificial intelligence (AI) systems), harmful bias, technical capacity, procurement, data usage and storage, privacy, security, and the full or partial displacement of human decision making and discretion that may arise when agencies rely on AI tools.⁷ There are also practical challenges associated with the development and use of agency-specific algorithmic tools that may lead agencies to rely on the algorithmic tools developed and used by GSA and other agencies. These challenges include the potentially high startup costs associated with developing or procuring them, the need to develop internal capacity and expertise to use them appropriately, related needs in staffing and training, and the need for ongoing maintenance and oversight.

The Conference recognizes that agencies may be able to leverage algorithmic tools to more efficiently, cost-effectively, and accurately identify rules (including those that incorporate standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate cross-references, or might benefit from resolving issues with intersecting or overlapping rules or standards. Because agencies have only recently begun using algorithmic tools to support retrospective review, this Recommendation does not address the potential use of those tools to perform more complex tasks—such as identifying rules that may need to be modified, strengthened, or eliminated to better achieve statutory goals or reduce regulatory burdens—for which the potential risks and benefits are still unclear and which may raise additional issues regarding agency decision making, including those highlighted above. This Recommendation identifies best practices for agencies to acquire, use, and assess algorithmic tools for retrospective review in a way that accords with applicable legal requirements and promotes accuracy, efficiency, transparency, and accountability. To encourage coordination and collaboration across the executive branch, this Recommendation also encourages GSA to

⁷ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 FR 6616 (Jan. 22, 2021).

continue to explore options for developing, acquiring, and using algorithmic tools to support retrospective review and share its findings and capabilities with other agencies, and the Office of Management and Budget to provide guidance on the use of these tools to support retrospective review.

RECOMMENDATION

1. Agencies should assess whether they can use algorithmic tools to more efficiently, cost-effectively, and accurately identify rules (including those that incorporate standards by reference) that are outmoded or redundant, contain typographic errors or inaccurate cross-references, or might benefit from resolving issues with intersecting or overlapping rules or standards.
2. When agencies contemplate using an algorithmic tool to support retrospective review, they should consider whether it would be most efficient, cost-effective, and accurate to develop a new tool in-house, implement a tool developed and made available by another agency, or procure a tool from a commercial vendor or contractor. In making this determination, agencies should assess whether there is an existing tool that meets their needs and, in so doing, consult with other agencies that have experience using algorithmic tools to support retrospective review. If there is no such tool, agencies should consider whether they have sufficient in-house expertise and capacity to develop an adequate tool.
3. Agencies should ensure that agency personnel who use algorithmic tools to support retrospective review have adequate training on the capabilities and risks of those tools and that regulatory decision makers carefully assess the output before relying on it.

4. To promote transparency and build internal expertise, agencies should, when developing or selecting an algorithmic tool to support retrospective review, consider open-source options and those that would maximize interoperability with other government systems. Agencies should ensure that key information about the algorithmic tool's development, operation, and use is available to agency personnel and the public.
5. When agencies publish retrospective review plans and descriptions of specific retrospective reviews, as described in Recommendation 2021-2, *Periodic Retrospective Review*, they should disclose whether, and if so, explain how, they plan to use or used algorithmic tools to support retrospective review. Additionally, when agencies incorporate retrospective reviews in their Learning Agendas and Annual Evaluation Plans, as described in Recommendation 2021-2, they should include information about the use of algorithmic tools.
6. When the analysis deriving from a retrospective review using an algorithmic tool will influence a new rulemaking, agencies should be transparent about their use of the tool and explain how the tool contributed to the decision to develop the new rule.
7. Agencies should share their experiences with each other in using these tools. To manage risk and monitor internal processes, agencies should consider developing their own internal evaluation and oversight mechanisms for algorithmic tools used in retrospective review, both for initial approval of a tool and, as applicable, for regular oversight of the tool.
8. The General Services Administration should continue to explore options for developing, acquiring, and using algorithmic tools to support retrospective review and share its findings and capabilities with other agencies.

9. The Office of Management and Budget should provide guidance on the use of algorithmic tools to support retrospective review.

Administrative Conference Recommendation 2023-4

Online Processes in Agency Adjudication

Adopted June 15, 2023

Millions of people each year navigate adjudication systems administered by federal agencies to, among other actions, access benefits and services, answer charges of legal noncompliance, and settle disputes with third parties. Individuals participating in these systems often expend substantial time and resources completing forms, submitting evidence and arguments, and monitoring their cases, while agencies expend substantial time and resources processing submissions, managing dockets, and providing case updates.

To improve accuracy, efficiency, and accessibility, and fulfill legal obligations to develop electronic business processes,¹ agencies increasingly have deployed online processes by which parties, their representatives, and other interested persons can perform routine tasks such as filing, serving, and viewing forms, briefs, evidence, and other case records or materials.² These processes range from simple email-based systems to robust online self-help portals that allow users to update contact information, communicate with agencies, complete forms, submit and view case records or materials, and perform other tasks. These processes ideally link with

¹ See, e.g., 21st Century Integrated Digital Experience Act, Pub. L. No. 115-336, 132 Stat. 5025 (2018); E.O. 14058, 86 FR 71357 (Dec. 16, 2021); OMB, EXEC. OFF. OF THE PRESIDENT, M-19-21, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, TRANSITION TO ELECTRONIC RECORDS (June 28, 2019); OMB, EXEC. OFF. OF THE PRESIDENT, M-23-07, MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, UPDATE TO TRANSITION TO ELECTRONIC RECORDS (Dec. 23, 2022); OMB, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-11, SEC. 280 (2020).

² Matthew A. Gluth, Online Processes in Agency Adjudication (May 24, 2023) (report to the Admin. Conf. of the U.S.).

agencies' own electronic case management systems,³ which serves also to reduce the time agency staff spend receiving paper records, converting them into an electronic format, and associating them with case files.

If properly deployed, these processes make adjudication systems easier to use and more accessible to the public, reduce the administrative burden on agency staff, and increase the accuracy of information collected during adjudication. However, these processes can also pose significant risks, including increased burdens due to poor design, exposure of agencies' computer systems to malware and other security threats, and ongoing costs of maintenance and upgrades. In designing and implementing online processes, agencies should not only address these risks but also ensure that they meet all legal accessibility requirements.⁴ In addition, agencies should make user resources available in languages other than English.⁵

Examples of agencies with online adjudication processes include the Social Security Administration, Department of Veterans Affairs, and U.S. Citizenship and Immigration Services, which have launched robust customer service portals that let parties perform tasks at many stages of adjudication from case initiation through appeal. Others have only recently begun to develop online processes, particularly in response to office closures during the COVID-19 pandemic.

This Recommendation encourages agencies to develop online processes and provides best practices for agencies to consider when doing so. Of course, agencies have different needs, serve different communities, and have different resources available to them. Further, what works best for one agency may not be appropriate for another. This Recommendation identifies steps

³ See Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 FR 30683 (June 29, 2018).

⁴ See, e.g., Rehabilitation Act of 1973, 508, 29 U.S.C. 794d; Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861; E.O. 13985, 86 FR 7009 (Jan. 25, 2021).

⁵ See, e.g., E.O. 13166, 65 FR 50121 (Aug. 11, 2000).

that agencies can consider at any stage of developing online processes to improve the accuracy, efficiency, and accessibility of their adjudication systems.

RECOMMENDATION

Accessing Online Processes in Adjudication Systems

1. Agencies' online processes should work effectively with relevant electronic case management systems (eCMS) and agency websites where adjudication materials are made publicly available.
2. Agencies should develop online self-help portals that allow users, as applicable and when feasible, to:
 - a. Update contact information, including email addresses, phone numbers, and physical addresses;
 - b. Complete and submit forms;
 - c. File briefs, evidence, and other documents;
 - d. Receive service of documents, including documents filed by other parties and agency notices and orders;
 - e. View and download case documents;
 - f. Make payments (e.g., filing fees, application fees, civil penalties);
 - g. Schedule meetings, conferences, hearings, and other appointments;
 - h. Access virtual appointments;
 - i. View case status information and information about deadlines, appointments, and wait times, when agencies can reliably predict them;
 - j. Receive reminders about upcoming deadlines and appointments; and

- k. Receive notifications about new documents, status changes, and other developments in their cases.
- 3. Online self-help portals should allow different functionality, with appropriate permissions, for different types of users, including agency staff and contractors, parties, intervenors, representatives and their staff, amici curiae, and the public.
- 4. Agencies should ensure online self-help portals employ security mechanisms, such as firewalls and encryption, to protect sensitive user information and maintain the system's integrity. Agencies should also ensure self-help portals employ mechanisms to authenticate users when necessary. Agencies that authenticate users by requiring them to register for and log in to online self-help portals should allow users to use Login.gov or other universal logins used by government agencies. These security mechanisms should not compromise the ability of non-authenticated users to access public documents.

Electronic Filing and Forms

- 5. Agencies should permit, and consider requiring, parties to file documents electronically. If agencies require electronic filing, they should implement exceptions for when electronic filing would be impossible or impracticable or a party has demonstrated good cause for using an alternative means of submission.
- 6. Agencies should ensure that their processes for electronic filing allow users, as applicable and when feasible, to:
 - a. File documents in batches;
 - b. File documents of a large enough size to encompass common filings;
 - c. File documents in multiple file formats, except that users should be required to file documents in a format that cannot be edited, such as Portable Document

Format (PDF), unless a specific procedure requires parties to submit documents that can be edited (e.g., a proposed order);

- d. Notify the agency that documents being filed contain legally protected or other sensitive information; and
 - e. Notify the agency that documents are being filed under seal or in camera.
7. Agencies without an eCMS should allow participants in an adjudication to file briefs, exhibits, and other documents electronically by emailing them to a designated agency email address, uploading them to a web-accessible file-hosting service, or transferring them to the agency using a secure file transfer protocol (SFTP).
 8. Agencies with an eCMS should develop tools that can be used to submit documents directly into the eCMS. These tools should require users to provide, or allow the system to capture, information about their submission, such as document type, purpose, or date, which would be stored as structured metadata in the eCMS, so long as it would not be confusing or burdensome for users.
 9. Agencies with an eCMS should consider developing application programming interfaces (APIs) that allow users, such as representatives, who use their own eCMS to transfer data directly and securely between a user's eCMS and the agency's eCMS, without needing to use a self-help portal as an intermediary.
 10. Agencies that have forms or templates for use in adjudications (e.g., applications, appointment of representative, hearing requests, requests for agency appellate review, subpoena requests) should post PDF versions of the forms or templates on their websites and allow users to complete, sign, and submit them electronically. Agencies should adapt

frequently used forms as web-based forms that users can complete and submit using a web browser. When feasible, web-based forms should:

- a. Be prepopulated with information about a user or case that the agency already has collected in an eCMS or other database; and
- b. Be based on prepopulated data and previous responses, requiring users to answer only questions that are relevant to them.

11. Except when explicitly prohibited by statute, agencies should allow participants in adjudications to sign documents electronically and, as applicable, accept as valid electronic signatures:

- a. A form or document submitted through an agency's online self-help portal while registered for and logged in to the portal;
- b. A cryptographic digital signature;
- c. A scanned or other graphical representation of a handwritten signature;
- d. A conformed signature (e.g., "/s/ Jane Doe"); and
- e. An email used to transmit the document.

12. Agencies should consider whether to review some or all electronically filed documents before associating them with a case file. For example, agencies should ensure that documents are associated with the correct case file, that they comport with agency rules, and that they do not disclose legally protected or other sensitive information, such as when a party files or requests to file a document under seal or in camera.

Electronic Service

13. Agencies should allow electronic service, except when electronic service would be impossible or impracticable or a party has good cause for needing alternative means of delivery.
14. Agencies with an eCMS should provide automated service through notice when a document has been filed through the web portal.
15. Agencies without an eCMS should allow parties to serve documents to other parties electronically, such as by emailing documents to other parties. Agencies that allow parties to submit documents using a file-hosting service or SFTP should ensure that all parties are notified when new documents become available.

Management of Sensitive Documents

16. Agencies that redact legally protected or other sensitive information from documents before making them available to other parties or publicly available should clarify whether parties should submit redacted versions of documents or whether the agency will make the necessary redactions.

Scheduling, Notifications, and Reminders

17. Agencies should provide an online tool for parties to schedule meetings, conferences, hearings, and other appointments efficiently and at times that are reasonably convenient for all participants.
18. Agencies with an eCMS should provide automatic notifications or reminders to users about important events and developments, such as when (a) a new document has been submitted and is available to view; (b) an agency notice or order is available to view; (c) the case status changes; (d) a meeting, conference, hearing, or other appointment is scheduled or upcoming; and (e) a filing deadline is approaching. Notifications and

reminders should be available in an online self-service portal and sent by email and/or by text message, according to user preferences.

Developing and Improving Online Processes

19. When designing and implementing online processes, especially before making them mandatory, agencies should consult potential users and relevant stakeholders, including parties, representatives, adjudicators and adjudicative staff, agency personnel who represent the government in adjudicative proceedings, and personnel who provide customer service or oversee customer experience functions for the agency. Agencies should also continuously solicit feedback from users on their online processes, for example through online surveys and listening sessions, and should use that feedback to identify and prioritize improvements.
20. When designing or working with a contractor to design their online processes, agencies should create systems that can be expanded to incorporate new technologies without requiring replacement.
21. Agencies should ensure that their online processes function on multiple platforms including, when practicable, mobile devices.

Guidance, Training, and Outreach

22. Agencies should update their rules of practice to permit or, when appropriate, require the use of online processes.
23. Agencies should develop self-help materials (e.g., instruction manuals, reference guides, instructional videos) and, if needed, hold training sessions to help agency personnel and the public understand how to use the agency's online processes. Materials intended for

the public should be posted in an appropriate location on the agency's website and made accessible through any online self-help portal.

24. Agencies should conduct public outreach if needed to encourage parties and representatives to use their online processes, even prior to making an online process mandatory.

25. Agencies should make staff available to assist all users of the agency's online processes, including agency personnel, and should inform users when such assistance is available (e.g., during normal business hours).

[FR Doc. 2023-14069 Filed: 6/30/2023 8:45 am; Publication Date: 7/3/2023]